May 11, 1946

MOTION ON THE JURISDICTION OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

I, as Defense Counsel for some of the defendants of the present trial and representing the members of the Japanese Attorneys' Association, hereby submit a motion on the jurisdiction of the International Military Tribunal for the Far East.

Part I

As declared in the Special Proclamation, dated 19 January 1945, of Supreme Commander for the Allied Powers, the International Military Tribunal for the Far East is a special Tribunal established in accordance with a provision, declared as one of the terms of surrender of Japan in the Potsdam Declaration of 26 July 1945, which was accepted by the Japanese Government on 2 September of the same year when the Instrument of Surrender of Japan was executed at Tokyo Bay.

Therefore, it must be emphasized that the jurisdiction of this Tribunal should be confined within such a scope as may be justified by the pertinent interpretation of the term "war criminals" employed in the Potsdam Declaration mentioned above.

Inasmuch as the term "war crime" or "war criminal" is the long standing technical expression of International Law, it may safely be admitted to construe that the term in the Potsdam Declaration was employed and accepted in its recognized conception by both parties concerned.

According to the general conception recognized by International Law before July 1945, the term "war criminal" denotes such a person as may be punished by the precedent of International Law for the violation of rules and

customs of warfare. For instance, violations of rules of warfare by members of armed forces, hostilities in arms of individuals who are not members of the armed forces, harmful acts of disguised persons, espionage, war treason and other offenses of like nature, have hitherto been regarded as war crimes. But participation in the planning, preparation, initiation or waging of war, whatever the nature of the war may be, had never been included in the recognized conception of war crimes before July 1945 - not to mention acts against humanity during or before war. The Articles 441 and 442 of the Manual of British Military Law amended in 1929 may suffice to maintain this standpoint. The Article 441 of the Manual, giving a definition to war crime, provides that the term "war crime" is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the defenders, while the Article 442, classifying war crimes, provides as follows:

"War crimes may be divided into four classes -

1. Violation of the recognized rules of warfare by members of the armed forces.
2. Illigitimate hostilities in arms committed by individuals who are not members of the armed forces.
3. Espionage and war treason.
4. Marauding"

and explanatory notes in a book published on 31 January 1936 by the British War Ministry regarding the term "war crime" reads as follows:-

"According to the customary usage of the term during the period of 1914-18, the term "war crime" meant violation of the recognized rules of warfare, rather than those enumerated in the text, but it must be remembered that the term has been matured and determined by the International Law."

Most of the works on International Law written by world famed scholars; e.g. Vol. II P. 452 of International Law, written by Mr. Oppenheim published in England in 1935 and P. 44 of The Wartime International Law, written by Prof. Tate of Japan, published in September 1944, follow the same definition and classification of war crimes as those adopted in the Manual of British Military Law. Neither the planning, preparation or execution of war, nor acts against humanity performed during or before war, are included in the category of war crimes by these two writers.

Nor doesthe Pact of 1928 renouncing recourse to war for the solution of international conflicts expand the scope of war crimes. The Article I of the Pact, providing that "High contracting parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies", should not necessarily be construed to mean that the waging of war for the solution of international controversies has been taken for granted as war crime, but it should be construed to mean that the powers concerned simply condemned and renounced recourse to war as an instrument of national policy in their relations with one another". In fact, the Manual of British Military Law, as well as the two books cited above, still adopt such definition and classification of war crimes as shown above, in spite of the fact that the former was amended and the latter was published after 1928 when the Pact was signed. No other international treaties, modifying the recognized conception of war crimes could be traced, excepting that at some particular conferences of a certain limited number of nations, e.g. Pan-American Conference, an attempt was made for the modification of the recognized conception of war crime by classifying aggressive war as war crime. But it must be emphasized that any decision adopted at a conference of this nature has no authority of binding any country

that was not represented at the conference. Needless to say, attempts that have been made after 26 July 1945 when the Potsdam Declaration was issued, e.g. the Charter of the Neurenberg Tribunal, have no concern with the interpretation of the Potsdam Declaration of 26 July 1945. In connection with the Charter cited above, it must be emphasized that any decision adopted by the victorious nations after 26 July 1945 for the prosecution of those responsible for a particular state that had surrendered unconditionally has no power of altering the terms of surrender determined before that date for other belligerents.

At the beginning of the Special Proclamation of Supreme Commander for the Allied Powers, that was issued simultaneously with the Charter of this Tribunal, is stated that "whereas the United States and the nations allied therewith in opposing the illegal war of aggression of the Axis nations, have from time to time made declarations of their intention that war criminals should be brought to justice". But it must be remembered that declarations directed to any state other than Japan should have no connection with the Charter of this Tribunal. In no declaration binding Japan is there any pertinent provision that could possibly help the clear cut interpretation of the terms of surrender of Japan; nor does any declaration provide or suggest the punishment of those who planned or prepared war or those who performed against humanity before or during war. Furthermore, His Excellency, President Truman stated in his message to the Congress of January 1946, that "For the first time in history the legal culpability of war makers is being determined." This clearly explains that the "war makers", namely, those who participated only in the formulation or execution of war are not included in the category of conventional war criminal.

In consideration of the above statement, now we may safely conclude that those who participated only in the planning, preparation, initiation or

execution of war in a greenroom are not included in war criminals denoted in the Potsdam Declaration of 26 July 1945; namely, those who held the important official positions of the Japanese Government, as well as those high military officers and other civilian leaders of Japan should not be treated as war criminals simply because of their having participated in the formulation or execution of war in a greenroom. In other words, it may be admitted to construe that the term "war criminal" in the Potsdam Declaration of 26 July 1945 was used in its recognized sense and was accepted by Japan in that sense only.

Disregarding all the theories and precedents cited above, Chief of Counsel, together with his associated counsels, alleges, in his indictment delivered to defendants on 29 and 30 April 1946, that those enumerated below should be included in the category of war crimes, as well as conventional war crimes; namely:-

1. Participation as leaders, instigators or accomplices in the formulation or execution of a common war or conspiracy (Count 1 - 36 under "Crimes against Peace").
2. Violations of treaties, etc., e.g. Treaties and Final Protocol for the suppression of the abuse of opium and other drugs which are not regarded as conventional rules of warfare (Count 53 - 55 under "Crimes against Humanity" with the exception of those concerning conventional war crimes and Appendix E)
3. Acts inflicting injuries upon the lives of members of the armed forces or civilians at the outbreak of war or by attacks during war. (Counts 37 - 52 under "Murder").

I request that the foregoing acts indicted, being outside the jurisdiction of the International Military Tribunal for the Far East, be excluded

from its trial.

In connection with this request, a few words must be added regarding Crimes against Peace and Crimes against Humanity which are provided in the Article V of the amended Charter of International Military Tribunal for the Far East, issued on 26 April 1946 in the name of Supreme Commander for the Allied Powers. As shown in the Special Proclamation cited at the beginning of Part I of this motion, the governments of the Allied Powers have conferred upon Supreme Commander for the Allied Powers "the authority to issue all orders for the implementation of the Terms of Surrender" of Japan. But it could hardly be believed that the governments of the Allied Powers could have conferred upon the Supreme Commander any authority that they have not possessed themselves for the implementation of the Terms of Surrender of Japan by virtue of the Potsdam Declaration of 26 July 1945 and the Instrument of Surrender of Japan executed on 2 September of the same year at Tokyo Bay. Supposing that the Supreme Commander had believed that he had the authority which the governments of the Allied Powers have never conferred upon him and made new Rules of Punishment by virtue of that authority, the rules set forth under such circumstances should be vetoed as null and void. If any one could make new rules or change them at will without any pertinent authority, the principle against ex post facto laws which is recognized by all civilized nations as the Supreme Law, would utterly be disregarded.

Part II

As pointed out in Part I of this motion, the jurisdiction of the International Military Tribunal for the Far East is based on the provision regarding the punishment of war criminals that had been declared, inter alia, in the Allied Declaration of 26 July 1945 and the Instrument of Surrender of

Japan executed on the 2nd September. Inasmuch as the purpose of these documents was to terminate the state of war existing at that time between Japan and the Allied Powers and the objects dealt with in those documents are of such nature as is solely related to that particular war, the prosecution of war criminals suggested in these documents should be confined within a scope of war criminals in, or relating to, the war which these documents sought to terminate. But in the indictment cited above are enumerated some affairs and incidents that had occurred quite independently from the war between Japan and the Allied Powers and some acts performed in connection with such affairs or incidents are indicted as war crimes; namely:-

1. Activities of the Japanese Government in the Provinces of Hioo-ning, Kirin, Heilung-Kiang and Jehol (Count 4)
2. Armed conflicts between Japan and the Union of Soviet Socialistic Republics that had been settled some years before the outbreak of war between Japan and the Allied Powers (Count 25, 26, 35, 36, 51 and 52).

In connection with these incidents and affairs, it must be pointed out that two agreements were executed between Japan and the US.S.R. in August 1938 and in September 1939 for the settlement of the Lake Khasan Affairs and the Khochin Col River Affairs respectively (Vide Evidences Nos. 1 & 2, submitted by defendants).

These two agreements were followed by the Russo-Japanese Neutrality Pact of 1941. The preamble and the Article I of this Pact read as follows:

"With a view to stabilizing peaceful and friendly relations between the two countries, etc., etc.

"Article I. Both contracting parties agree to maintain peaceful and friendly relations between themselves and mutually respect the territorial

integrity and inviolability of the other contracting parties".

Tied up with this friendly Pact, Japan and the U.S.S.R. had maintained very peaceful and friendly relations till August 1945 and really there existed no state of war between the two countries when the Potsdam Declaration was issued on the 26th July 1945.

Supposing that such war crimes as enumerated in Counts 25 and 26 had been committed in connection with the incidents mentioned therein, they are not the war crimes to be dealt with in accordance with the Potsdam Declaration of 26 July 1945 and the Instrument of Surrender of Japan executed on 2nd September of the same year, because these two affairs had occurred long before the outbreak of war between Japan and the Allied Powers and had no connection with it.

Therefore, I request that those counts enumerated above be excluded from the trial of the International Military Tribunal for the Far East.

Part III

As pointed out in Part I of this motion, the jurisdiction of the International Military Tribunal for the Far East is based on the provisions regarding the punishment of war criminals that had been declared, inter alia, in the Allied Declaration of 26th July 1945 and the Instrument of Surrender of Japan executed on 2nd September of the same year. Inasmuch as the purpose of these two documents was to terminate the state of war existed at that time between Japan and the Allied Powers, the prosecution of war criminals suggested in these documents should be confined within a scope of those who might have committed war crimes in connection with the war between Japan and the Allied Powers. In other words, war criminals to be prosecuted in connection with war or conflict between Japan and any non-allied nation have no

concern with the Potsdam Declaration and the Instrument of Surrender mentioned above. As is well known, Japan and the Kingdom of Thailand had maintained a very friendly relation throughout the war between Japan and the Allied Powers. In fact, on the 31st December 1941, Japan was related more closely with the Kingdom of Thailand by concluding the treaty of alliance which was still effective on that very day when the Potsdam Declaration of 26th July 1945 was issued. Therefore it could hardly be presumed that the Potsdam Declaration should have expected the punishment of crimes as far as the relations between Japan and the Kingdom of Thailand were concerned. Supposing that there had existed war between Japan and the Kingdom of Thailand, the latter was not a member of the Allied Powers. Chief of Counsel, however, together with his associated Counsels, alleges in his indictment cited above that all defendants are responsible for the aggressive war or the war in violation of treaties which Japan is alleged to have waged upon the Kingdom of Thailand (Count 4, in part, Count 16, 24 and 34).

Part IV

The request stated in Part I of this motion concerns with the interpretation of two official documents; namely, the Potsdam Declaration of 26th July 1945 and the Instrument of Surrender of Japan executed on 2nd September of the same year. When any doubt is raised as to the interpretation of document, I believe it admissible in accordance with the Law of Evidence, to submit evidences in order to ascertain such doubtful points as may be suggested. I, therefore, request that witnesses mentioned in a list appended herewith be summoned, and submit Evidence No. 1-3 and Evidence No. 4 in support of my request related in Part II and Part , respectively.

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